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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

REED ELSEVIER, INC., Plaintiff, -vs- INHERENT.COM, INC. a/k/a INHERENT, INC., Defendant.	Civil Action No. 05-4048 (JLL)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TRANSFER THE ACTION

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PRELIMINARY STATEMENT

This action is a contract dispute between a New Jersey-based plaintiff and an Oregon-based defendant properly brought in New Jersey. Despite having a ten-year business relationship with New Jersey-based Martindale-Hubbell ("MH"), a division of Plaintiff Reed Elsevier, Inc., which relationship included approximately 40 in-person visits to New Jersey, over 1,000 communications, and the performance of a Marketing Alliance Agreement that provided for dispute resolution here, defendant Inherent.com, a/k/a Inherent, Inc. ("ICI") now contends that it has no contacts with New Jersey upon which this Court can base personal jurisdiction.

Although it maintains that it has no contacts with New Jersey whatsoever, ICI's contacts with New Jersey are so pervasive that New Jersey can properly assert both general and specific jurisdiction. In addition to the decade-long relationship between the parties, most of the events giving rise to this action occurred in New Jersey. While contemplating MH's acquisition of ICI, which was initiated by ICI, the parties executed a Non-binding Letter of Interest ("Letter of Interest") to facilitate their negotiations. It is this Letter of Interest that ICI claims amounts to a contract that was breached by MH when it decided, in its New Jersey office, not to pursue the proposed acquisition. MH's participation in the negotiations was conducted from New Jersey, and many other events occurred in New Jersey -- ranging from the trip of ICI's president to New Jersey to make a presentation on ICI, the negotiation of the Letter of Interest, to approximately 100 communications directed by ICI in Oregon to MH in New Jersey.

In addition to its repeated conclusory statements that it has no contacts with New Jersey, ICI also attempts to argue that venue is improper in New Jersey and that the matter should be transferred to California. While denying that New Jersey has any connection to the parties or the dispute, ICI simultaneously urges transfer to California, a location that, as ICI concedes, has nothing remotely to do with this dispute. ICI requests this transfer on the ground of convenience to the parties. The irony is apparently lost on ICI. Venue here is proper as this case was removed by defendant from New Jersey Superior Court. Because the majority of the witnesses and documents are located in New Jersey, it would serve the interests of justice to retain this action in the District Court of New Jersey rather than to transfer it thousands of miles away from where a large number of witness and documents are located to a jurisdiction with no relationship to the events leading up to the claims raised in this matter and where very limited witnesses (if any) and documents (if any) are located.

STATEMENT OF FACTS

A. The Parties.

MH, a division of Reed Elsevier, has its principal place of business in New Providence, New Jersey. [Declaration of Michael Little submitted herewith ("Little Decl."), ¶ 2; Declaration of Timothy B. Corcoran submitted herewith ("Corcoran Decl."), ¶ 2.] MH's business consists of providing various products and services used by the legal profession. [Little Decl., ¶ 2; Corcoran Decl., ¶ 2.]

At all times relevant to the circumstances giving rise to the claims in this action, ICI has been a corporation incorporated under Oregon law, with its only place of business listed at 2140 SW Jefferson Street, Suite 200, Portland, Oregon. [Little Decl., ¶ 3; Corcoran Decl., ¶ 3]. ICI's business consists of providing internet-related services (e.g., website development and hosting) for professional organizations, primarily law firms and legal professional associations throughout the United States and internationally as well. [Little Decl., ¶ 3; Corcoran Decl., ¶ 3.] ICI's website (www.inherent.com) reflects its business address as Portland, Oregon, and makes no mention of any office location in California.

Based on a review of the California Secretary of State records, ICI is neither registered to do business in the State of California nor registered as a foreign corporation. [Declaration of

Mark E. Duckstein, Esq. submitted herewith ("Duckstein Decl."), ¶ 10 and Exh. E.] Moreover, the local telephone directory assistance service has no phone listing in San Francisco for an "Inherent, Inc." or "Inherent.com." [Duckstein Decl., ¶ 10.]

B. MH was an ICI customer, and ICI and MH were parties to a Marketing Alliance Agreement, prior to the execution of the Non-Binding Letter of Interest.

Since the mid-1990s, MH and ICI had a long-standing business relationship where MH hired ICI to build websites for MH's proprietary business. Thereafter, MH and ICI entered into a Marketing Alliance Agreement pursuant to which ICI provided website design work for MH's law firm customers. [Corcoran Decl., ¶¶ 4-5 and Exh. A.] The Marketing Alliance Agreement provided that any disputes between the parties would be resolved through an arbitration to take place in either New Jersey or New York. [Corcoran Decl., ¶ 6 and Exh. A (paragraph 11 of Marketing Agreement).] ICI viewed its marketing arrangement with MH as an important relationship, and to this day touts its connection with MH on its website. On its website (www.inherent.com), ICI highlights its relationship with MH from 1996-2002 as a "strategic marketing agreement to promote and develop Web sites for law firms worldwide."

During the years in which the Marketing Alliance Agreement was in effect, ICI at times received annual revenues in excess of $200,000 that were generated by MH's sales to its customers. [Corcoran Decl., ¶ 7.] By 2002, MH discontinued its relationship with ICI under the Marketing Alliance Agreement. [Corcoran Decl., ¶ 8.] However, the relationship between MH and ICI remained cordial and MH continued to do business with ICI. [Corcoran Decl., ¶ 9.] In 2003, MH paid ICI over $93,000; in 2004, MH paid ICI over $67,000; and in 2005, MH's payments to ICI so far have been approximately $78,000. [Corcoran Decl., ¶ 9.] Since January 2000, MH has paid ICI over $1,000,000, and ICI currently hosts four of MH's websites. [Corcoran Decl., ¶ 4.]

ICI had extensive contact with MH's New Jersey office over the course its business relationship with MH. ICI executives visited MH's New Jersey offices approximately forty times, with approximately 35 visits by the President of ICI (three individuals held that office successively), including ICI's current President, Ms. Debra Kamys. [Corcoran Decl., ¶ 11.] In addition, ICI traveled with MH personnel to many locations outside of Oregon, such as to trade shows and other client or business related events, in connection with the Marketing Alliance Agreement -- thereby demonstrating the national scope of its business and its willingness to travel beyond Oregon's borders in order to generate revenue for the company. [Corcoran Decl., ¶ 12.]

As a result of their business relationship, MH and ICI were in extremely regular contact for almost a ten-year period -- with the frequency of those contacts being very high during the 1996-2002 time frame in which the Marketing Alliance Agreement was operative. [Corcoran Decl., ¶ 13.] Prior to August 2004, when the facts giving rise to the present claims began, ICI representatives contacted MH personnel in New Jersey hundreds of times by telephone and likely sent over 1000 e-mails to MH representatives in New Jersey. [Corcoran Decl., ¶ 14.] In addition, ICI sent many documents to MH representatives in New Jersey by mail and by facsimile transmission. [Corcoran Decl., ¶ 14.]

C. ICI proposes an acquisition deal to MH.

In approximately August 2004, ICI, through its President, Debra Kamys, contacted MH in New Jersey about whether MH would be interested in exploring a possible acquisition of ICI or entering into some other sort of partnering arrangement. [Corcoran Decl., ¶ 15; Little Decl., ¶ 4.] An MH competitor had recently acquired an ICI competitor, and Ms. Kamys suggested that a proper competitive response to that transaction might be for MH to acquire ICI. [Corcoran Decl., ¶ 15; Little Decl., ¶ 4.]

After preliminary discussions, MH and ICI entered into a Non-Disclosure Agreement dated November 1, 2004, to explore a potential business relationship and to enable ICI to provide purportedly proprietary information for MH's evaluation of a possible transaction. [Little Decl., ¶ 5 and Exh. A.] By its terms, the Non-Disclosure Agreement was governed by New Jersey law, and established a two-year period (through November 1, 2006) during which its confidentiality terms remained in effect. [Little Decl., ¶ 6 and Exh. A.] The Non-Disclosure Agreement set forth certain described limitations on the use by either MH or ICI of confidential, proprietary, or trade secret information disclosed by the other party, and further provided that proprietary information would be returned or certified as destroyed, upon ICI's written request. [Little Decl., ¶ 6.]

Many MH employees were involved in evaluating a potential acquisition or other strategic alliance with ICI, and the vast majority of these witnesses are located in New Jersey. [Little Decl., ¶¶ 19-20.] From August 2004 through June 2005, MH and ICI had many communications (by telephone, e-mail, and in person) regarding a potential business relationship between the companies, and ICI provided MH with information regarding its operations. [Little Decl., ¶ 7.] During this period, ICI called or sent e-mails to MH representatives in New Jersey approximately 100 times to discuss the potential acquisition of ICI by MH or some other business relationship. [Little Decl., ¶ 7.] In addition, in May 2005, Ms. Kamys traveled to New Jersey to spend a full day with key executives from MH and its affiliate, LexisNexis, making presentations about ICI's products and business operations in order to encourage them to pursue a possible transaction with ICI. [Little Decl., ¶ 7.]

D. The Non-binding Letter is fully-executed on June 17, 2005, and thereafter, MH performs due diligence.

During Ms. Kamys's visit to New Jersey in May, 2005, MH presented ICI with a proposed non-binding Letter of Interest (the "Non-binding Letter"), which stated MH's ". . . preliminary non-binding indication of interest in acquiring the web site development, management and hosting applications and services business . . . of Inherent.com, Inc. . . . and [its] proposed next steps to move this potential transaction forward." [Little Decl., ¶ 8 and Exh. B.]

From late May through mid-June 2005, ICI and MH (from New Jersey) continued to negotiate the terms of the Non-binding Letter. [Little Decl., ¶ 9.] Among the modifications made at ICI's request was an amendment of the language to provide that the possible transaction was subject to the parties reaching "mutually acceptable" purchase and sale contract terms and the execution of definitive transaction documents. [Little Decl., ¶ 9 and Exh. C (at page 3).]

The Non-binding Letter was fully executed on June 17, 2005. [Little Decl., ¶ 9 and Exh. C.] The Letter expressly provided that its execution did not obligate MH to complete any transaction with ICI. In that regard, the Non-binding Letter proposed by MH to ICI provided that:

> ". . . this letter and the acceptance thereof is non-binding and creates no legally binding obligation on the part of the parties to conclude the proposed transaction, and no legally binding obligation to conclude the proposed transaction will be created, notwithstanding any subsequent actions or communications, written or oral, between the parties, even though they may express or imply partial or preliminary agreement, except by the execution and delivery by all parties of definitive transaction documents."

[Little Decl., ¶ 11 and Exh. C at p.5.] The fully executed Non-binding Letter further stated that MH's interest in purchasing Inherent was contingent on numerous specified "conditions precedent" to the completion of any transaction, including but not limited to (i) the satisfactory completion "of a full commercial, financial, technical and legal due diligence" by MH, (ii) the negotiation of acceptable purchase and sale contract terms acceptable to Reed Elsevier, and (iii) approval by the Board of Directors of Reed Elsevier. [Little Decl., ¶ 10 and Exh. C.] Moreover, ICI was well aware that the due diligence period following the execution of the Non-binding Letter could result in the termination of discussions. In that regard, the Non-binding Letter expressly provided that ICI would cease solicitation of other offers to dispose of ICI's business "until a transaction is consummated or terminated, or July 31, 2005, whichever first occurs." [Little Decl., Exh. C at pp. 4-5.]

On June 15, 2005, ICI signed the revised Non-binding Letter dated June 8, 2005, and sent it to MH's New Jersey office. [Little Decl., ¶ 12.] On June 17, 2005, a significant ICI shareholder also signed the Non-binding Letter, as required by MH. [Little Decl., ¶ 12.] Following the execution of the Non-binding Letter by ICI, MH undertook due diligence necessary to evaluate the feasibility and potential terms of a business transaction with ICI. [Little Decl., ¶ 13.]

E. MH informs ICI on June 28, 2005, that it does not wish to proceed with any transaction with ICI.

While performing due diligence, MH learned information which caused it to discontinue its consideration of any business transaction with ICI. [Little Decl., ¶ 14.] Among other reasons, MH elected to terminate its interest in entering into such a transaction with ICI because the due diligence review revealed (i) many problems with ICI's technology and database (its principal asset was its computer code, which was found to be riddled with errors and no longer supported by the licensor of the technology), (ii) that ICI's finances were much weaker than expected, (iii) that ICI's customer base was less than what was represented, and (iv) that none of ICI's employees had non-compete agreements, and one of them -- the former chief technology representative -- had recently quit to establish a competitive venture. [Little Decl., ¶ 14.]

During the course of performing due diligence on ICI's assets, liabilities, sales, marketing, and other business and financial operations, MH found no indication that ICI had any offices in California, any employees in California, or any real property in California. [Little Decl., ¶ 15.]

On June 28, 2005, less than two weeks after the Non-binding Letter had been fully executed by the parties, MH's Chief Operating Officer, who was located in New Jersey, advised ICI by telephone and in writing that MH had no interest in moving forward with any proposed transaction with ICI. [Little Decl., ¶ 16 and Exh. D.] Following MH's decision to terminate the discussions between the parties, MH undertook to gather and return to ICI the confidential information provided under the Non-Disclosure Agreement to ICI, and secured certifications from members of the MH due diligence team stating that they did not retail confidential information regarding ICI. [Little Decl., ¶ 17 and Exh. E.]

F. MH files its action in New Jersey on July 18, 2005 after which ICI files its own action in California on July 29, 2005.

After the termination of discussions about a potential acquisition or other business arrangement, and in direct contravention of the express terms of the Non-binding Letter, ICI claimed that MH was obligated to purchase ICI. [Duckstein Decl., ¶ 3.] On July 18, 2005, Reed Elsevier, filed this action against ICI in the Superior Court of New Jersey (Docket No. UNN-L-2583 05), seeking to construe the terms of the Non-binding Letter and a judgment declaring that (i) MH did not breach any obligation to ICI in connection with the parties' discussions concerning a potential business transaction as contemplated in the Non-binding Letter signed by the parties, and that (ii) Reed Elsevier has no liability to ICI for terminating its preliminary interest in pursuing such transaction. (the "New Jersey Action").

On August 16, 2005, ICI removed MH's New Jersey Action to the United States District Court for the District of New Jersey. On July 29, 2005, 11 days after learning that MH had filed this action in New Jersey, ICI filed an action in the Superior Court of California for the County of San Francisco, involving the same parties and same facts as the first-filed New Jersey Action. [Duckstein Decl., ¶ 8 and Exh. E.] The only connection between California and either ICI or this dispute, as far as MH can tell, is that California is where ICI's lawyer happens to be located. Furthermore, MH reasonably believes that ICI's lawyer, Patrick Catalano, Esq., is an uncle by marriage of Debra Kamys.

MH removed ICI's California action to the United States District Court for the Northern District of California, and then filed a motion to dismiss on the basis that an identical and pre-existing action is pending in New Jersey or, in the alternative, to transfer that action to the District of New Jersey (where it can be consolidated). MH's motion is currently pending before the Northern District of California and is returnable on October 31, 2005.

LEGAL ARGUMENT

POINT I

NEW JERSEY HAS PERSONAL JURISDICTION OVER ICI

Rule 4(e) of the Federal Rules of Civil Procedure allows a district court to exercise personal jurisdiction over a non-resident defendant to the extent allowed by the long-arm statute of the state where the court sits. See Fed. Rule Civ. Proc. 4(e). New Jersey's long-arm statute permits the exercise of personal jurisdiction over a non-resident defendant to the full extent permitted by the Due Process Clause of the Fourteenth Amendment of the Constitution. See N.J. Sup. Ct. R. 4:4-4(c) (1); see also Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 96 (3d Cir. 2004); De James v. Magnificence Carrier Inc., 654 F.2d 280, 284 (3d Cir.), cert. denied, 454 U.S. 1085 (1981); Doumani v. Casino Control Comm'n, 614 F. Supp. 1465, 1471 (D.N.J. 1985).

A court may exercise personal jurisdiction over a non-resident defendant provided that "minimum contacts" exist such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The "minimum contacts" must be of the quality and nature such that the non-resident defendant "should reasonably anticipate being haled into court there." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985). Where a defendant brings a motion to dismiss for lack of personal jurisdiction, the plaintiff "need only establish a prima facie case of personal jurisdiction." Miller Yacht Sales, 384 F.3d at 96; see also Miller v. McMann, 89 F. Supp. 2d 564, 566 (D.N.J. 2000) ("plaintiff need only make a prima facie showing of jurisdiction by 'establishing with reasonable particularity sufficient contacts between the defendant and the forum state'") (quoting Mellon Bank (East) PSFS, Nat'l Assoc. v. Farino, 960 F.3d 1217, 1223 (3d Cir. 1992)). Factual disputes are to be resolved in favor of the plaintiff. Miller Yacht Sales, 384 F.3d at 96 ("all factual disputes drawn in [plaintiff's] favor"); Miller, 89 F. Supp. 2d at 566 ("A court must resolve all factual disputes created by affidavits and other evidence submitted by the parties in favor of the plaintiff").

Because the quality and nature of ICI's contacts with New Jersey are sufficient to establish either "general" or "specific" jurisdiction, as discussed below, the state and federal courts sitting in New Jersey may exercise personal jurisdiction over ICI.

A. ICI had sufficient and voluminous contacts with New Jersey in connection with the matters in dispute such that the exercise of specific jurisdiction.

Specific jurisdiction allows the Court to exercise jurisdiction on a lesser number of contacts with the forum provided that the "claim is related to or arises out of the defendant's contacts with the forum." Mellon Bank (East), 960 F.2d at 1221 (citations omitted); see also Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 & 414 n.8 (1984); Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 150 (3d Cir. 2001) ("In contract cases, courts should inquire whether the defendant's contacts with the forum were instrumental in either the formation of the contract or its breach"); Grand Entm't Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 482 (3d Cir. 1993) ("contract negotiations with forum residents can empower a court to exercise personal jurisdiction over persons outside the forum"). The rationale underlying such decisions is that it would be unfair to permit a defendant purposefully to contract with the plaintiff, thereby deriving a benefit from the forum state, yet avoid being held accountable for breaching such contracts. Burger King, 471 U.S. at 473-74 ("Where individuals purposely derive benefit from their [interstate contracts], it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities") (citations omitted). The facts show that ICI's contacts with New Jersey are sufficient for either general or specific jurisdiction over ICI in New Jersey.

Specific jurisdiction over ICI is satisfied through its New Jersey contacts in connection with the present claims. This dispute arises from MH's consideration of a potential acquisition of (or other transaction) with ICI. The possibility of any such deal began with ICI's solicitation of MH in New Jersey in its efforts to interest MH in such a transaction.[1] [Corcoran Decl., ¶ 15; Little Decl., ¶ 4.] To facilitate MH's exploration of a potential transaction, ICI executed a Non-Disclosure Agreement in which it agreed to New Jersey law as the governing law. [Little Decl., ¶ 6.] From August 2004 to June 2005, during the negotiations and discussions concerning a possible acquisition deal, ICI engaged in numerous contacts with MH's New Jersey office -- making or sending approximately 100 calls and e-mails to MH's New Jersey office, as well as at least one in-person visit to MH's New Jersey office for the purpose of making presentations directly to MH executives in an effort to convince them to purchase ICI. [Little Decl., ¶¶ 7-8.] See Gen. Elec., 270 F.3d at 150-51 (noting that today, electronic communications is common in commercial business arrangements and is factored into jurisdictional determinations). Moreover, among other events, it was during ICI's trip to New Jersey to meet with MH executives about a possible acquisition that ICI first received MH's proposed Non-binding Letter of Interest. [Little Decl., ¶¶ 8-16.] See Mellon Bank (East), 960 F.2d at 1221; Helicopteros, 466 U.S. at 414 & 414 n.8. Negotiations by ICI were directed to MH's New Jersey office thereafter, ultimately resulting in ICI sending its execution of the Non-binding Letter to New Jersey. [Little Decl., ¶¶ 9-12.]

In a similar case, Grand Entm't Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476 (3d Cir. 1993), the Third Circuit found that activities undertaken in furtherance of contract negotiations amounted to contacts sufficient to support a finding of specific jurisdiction. There,

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[1] In her declaration, Debra Kamys incorrectly states that "MH sought out ICI and contacted them about this purchase." [Kamys Decl. ¶ 6.] The accuracy of this statement is contradicted by ICI's own California counsel who noted in writing that Ms. Kamys approached MH on ICI's behalf to re-start discussions about an acquisition. [Duckstein Decl., ¶ 3]

Grand sued two Spanish corporations alleging breach of contract and tort resulting from contract negotiations between Grand's Pennsylvania agent and Star Media's California and Spanish agents for the purchase of distribution rights to 450 foreign films. Like here, the central dispute was whether a binding contract resulted from lengthy negotiations.

The Court found that contact negotiations with a forum resident can empower the exercise of personal jurisdiction. Id. at 482. The panel looked to the "prior negotiations and contemplated future consequences." Id. Although none of Star Media's agents personally visited Pennsylvania, 26 telexes and approximately 50 telephone calls had been exchanged with about half initiated by each party. Id. at 480. Since the dispute arose directly out of these contacts, they were held sufficient to support the exercise of jurisdiction over the defendants. Furthermore, the Court determined that the defendants "had voluntarily decided to negotiate with [plaintiff] and cannot now be heard to complaint about answering a suit concerning the effect of negotiations in the jurisdiction in which some of those negotiations occurred." Id. at 483. Here, ICI engaged in more contacts and even traveled into New Jersey as part of the negotiations.

B. ICI's relationship with MH since 1996 warrants the exercise of general jurisdiction.

In order for ICI to be subject to suit in New Jersey due to the existence of general jurisdiction, ICI's contacts with the forum state must be "continuous and substantial" so that ICI could expect to be haled into court here. Helicopteros, 466 U.S. at 414-16 & 414 n.9; Provident Nat'l Bank v. Calif. Fed. Sav. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987). To show specific jurisdiction, ICI must have purposefully directed its activities at residents of the forum, sufficient to establish minimum contacts under International Shoe. See Henry Heide, Inc. v. WRH Prods. Co., 766 F.2d 105, 108 (3d Cir. 1985).

ICI's entire argument against the existence of personal jurisdiction consists of its unsupported and conclusory statement that "ICI has no substantial contacts with the State of New Jersey." See ICI Br. At 5. ICI does not, and cannot, explain how it managed to have an ongoing, decade-long business relationship with a New Jersey corporation without having contact with the State. ICI similarly failed to offer the Court any reason why its dealings, communications, trips to New Jersey, and its contracts with MH are not substantial contacts with the State. Indeed, ICI appears to be under the misguided impression that if it does not maintain an office in New Jersey, it can defeat personal jurisdiction in New Jersey. To the contrary, ICI has substantial contacts with New Jersey regardless of the location of its offices.

As demonstrated by the Declarations of Timothy Corcoran and Michael Little, ICI's contention that "there is no substantial activity in the State of New Jersey which would subject ICI to general jurisdiction in this case" is false.[2] During the last 10 years or so, ICI continuously and purposefully directed its activity to New Jersey by selling its products and services to MH (to this day, ICI continues to host four of MH's websites and charges MH a fee for doing so), visiting MH's New Jersey's office approximately 40 times, entering into a Marketing Alliance Agreement with MH, sending numerous e-mails to MH in New Jersey, and making multiple phone calls to MH in New Jersey in connection with the parties' direct customer/vendor relation, their marketing alliance, and their recent discussions about a potential acquisition deal. [Little Decl., ¶¶ 7-8; Corcoran Decl., ¶¶ 11-14.] Moreover, under the Marketing Alliance Agreement, ICI agreed to arbitrate any dispute arising from the Agreement in New Jersey, which makes its position on this motion rather perplexing. [Corcoran Decl., ¶ 6.] Having agreed to resolve any disputes under such Agreement with MH in New Jersey, ICI cannot now claim that litigating a dispute in New Jersey is unreasonable or unexpected.

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[2] At a minimum, MH is entitled to take discovery on ICI's potential contacts with New Jersey in addition to the contacts derived from its relationship with MH. Specifically, ICI's website proclaims that it has clients nationwide and internationally and MH has reason to believe that ICI has done other business in New Jersey. If the Court were to conclude that specific jurisdiction does not exist, and that a sufficient showing has not been made to establish general jurisdiction, MH should be permitted discovery on ICI other business relationships with New Jersey residents before a decision is reached on the general jurisdiction issue.

Since 2000, ICI has received revenues of over $1 million from MH, a New Jersey business. [Corcoran Decl., ¶ 9-10.] Far from minimizing their connection to MH and New Jersey, ICI touted its relationship with MH as significant by highlighting its marketing alliance with MH on its website. See www.inherent.com. There is no doubt that ICI's contact with MH's New Jersey office was continuous and purposeful. Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-298 (1980) (selling goods or services in the forum state is sufficient for personal jurisdiction); Burger King, 471 U.S. at 474 (1985) (parties that sustain "continuing relationships and obligations" with the forum state have "purposefully availed" themselves of the benefits of the forum state); Roth v. Garcia Marquez, 942 F.2d 617, 623 (9th Cir. 1991) ("continuing and extensive involvement with the forum" sufficient for personal jurisdiction).

In light of its long-standing relationship with MH, which included communications by mail, by email, and in person, ICI could have reasonably anticipated being haled into court in New Jersey, and agreed to New Jersey as the law or locale for dispute resolution with MH in two separate agreements. ICI's continuing pattern of contact with MH in New Jersey, in connection with the parties' marketing agreement and the potential acquisition deal, make litigating this dispute in New Jersey fair and reasonable. Burger King, 471 U.S. at 477-478 (exercise of personal jurisdiction must be comport with "fair play and substantial justice"); Haisten v. Grass Valley Med. Reimbursement Fund Ltd., 784 F.2d 1392, 1397 (9th Cir. 1986).

POINT II

NEW JERSEY IS THE CORRECT VENUE FOR THIS ACTION

Venue in New Jersey is appropriate as a matter of law. Because this matter was removed from New Jersey state court into the federal system, venue is governed by 28 U.S.C. § 1441 -- not by 28 U.S.C. § 1391. Under § 1441, venue is automatically proper in the District of New Jersey.

When an action is removed from state court to federal court, it must be removed to the district court "embracing the place where such action is pending." See 28 U.S.C. § 1441(a). Pursuant to § 1441(a), a properly removed action necessarily fixes venue in the district where the state court action was pending. See Global Satellite Communication Co. v. Starmill U.K. Ltd., 378 F.3d 1269 (11th Cir. 2004); see also Polizzi v. Cowles Magazines, Inc., 345 U.S. 663, 665-66 (1953); Heft v. AAI Corp., 355 F. Supp. 2d 757, 771 (M.D. Pa. 2005). Thus, venue in New Jersey is per se proper in an action removed from New Jersey state court.

Pursuant to § 1441, ICI is not entitled to a dismissal of the action simply because it is displeased with venue in New Jersey. State law venue deficiencies cannot serve as the basis for dismissal of a removed action. Heft, 355 F. Supp. 2d at 770-71. Instead, a defendant who has removed a state court action to federal court and believes the case should be venued elsewhere has, as its exclusive remedy, the right to make a motion to have the matter transferred pursuant to 28 U.S.C. § 1404. See 28 U.S.C. § 1441(e)(6). For reasons stated below in Point III, transfer is not warranted.

Furthermore, the nexus between this action and New Jersey is so strong that even if § 1391 did apply, venue would be appropriate in the District of New Jersey. As described in Point I above, a substantial portion of the events relating to the claims occurred in New Jersey and ICI is subject to personal jurisdiction here. From the initial inquiry about a potential transaction between MH and ICI, through the decision by MH in New Jersey to terminate the discussions, many of the events related to the present claims occurred in New Jersey.

POINT III

NEW JERSEY IS THE MOST CONVENIENT FORUM FOR THIS ACTION BECAUSE THE BALANCE OF INTERESTS FAVORS KEEPING THE CASE IN THE DISTRICT OF NEW JERSEY

Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." See 28 U.S.C. § 1404(a). The purpose of § 1404(a) is to prevent the waste "of time, energy and money" and "to protect litigants, witnesses and the public against unnecessary inconvenience and expense." Clark v. Burger King Corp., 255 F. Supp. 2d 334, 337 (D.N.J. 2003) (citing Van Dusen v. Barrack, 376 U.S. 612, 616 (1964)). Where a defendant moves to transfer venue, that defendant bears "the burden of establishing the need for transfer." Park Inn Int'l., L.L.C. v. Mody Enters., 105 F. Supp. 2d 370, 377 (D.N.J. 2000); Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970), cert. denied, 401 U.S. 910 (1971) ("the burden is on the moving party"). Specifically, the movant must show that "(1) the case "might have been brought" in the district to which he asks the court to transfer it, and (2) the proposed transferee court would be a more convenient forum for the litigation." CIBC World Markets, Inc. v. Deutsche Bank Sec., Inc., 309 F. Supp. 2d 637, 643 (D.N.J. 2004).

In determining whether to transfer a matter under § 1404(a), the court must consider three factors: "(1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice." Hoffer v. Infospace.com, Inc., 102 F. Supp. 2d 556, 570 (D.N.J. 2000). These factors reflect the private interests of the parties and the public interest in the administration of courts and the adjudication of cases. Id. at 571-72. Private interests include the plaintiff's choice of forum, the ease of access to proofs, the availability of compulsory process over unwilling witnesses, and the cost of attendance of willing witnesses. Hoffer, 102 F. Supp. 2d at 572. Additional private interests are the defendants' forum preference, whether the claim arose elsewhere, and the location of relevant documentary evidence. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995). Public interests include court congestion and other administrative difficulties, placing the burden of jury duty on those having the closest ties to the action, the local interest in having the matter adjudicated in the forum, and the familiarity of the forum court with the applicable law. Hoffer, 102 F. Supp. 2d at 572. These factors are merely a guide, and not all factors are relevant in each case. Jumara, 55 F.3d at 879. The decision to transfer venue is discretionary and will typically embrace many of the factors listed. See Lony v. E.I. DuPont de Nemours & Co., 886 F.2d 628, 631-32 (3d Cir. 1989).

A. New Jersey Is The Most Convenient Forum.[3]

1. Federal Courts afford a Plaintiff's Choice of Forum Great Deference and Will Only Transfer if the Balance of Convenience is Strongly Tipped in Favor of the Defendant.

Although courts consider many factors on transfer motions, "a plaintiff's choice of forum is presumptively correct." Calkins v. Dollarland, Inc., 117 F. Supp. 2d 421, (D.N.J. 2000) (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981)); Shutte, 431 F.2d at 25 ("It is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request"). Accordingly, "unless the balance of convenience of the parties is strongly in favor of defendant, the plaintiff's choice of forum should prevail." Shutte, 431 F.2d at 25 (emphasis supplied); see also Park Inn, 105 F. Supp. 2d at 377 ("unless the balance is strongly tipped in favor of the defendant, the plaintiff's choice of forum should not be disturbed")

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3 For all of the reasons set for herein, transfer to Oregon (suggested by ICI as an alternative to California) is also not warranted. ICI claims that none of its witnesses or documents remain in Oregon. See ICI Br. at 6. Therefore transfer to Oregon cannot be more convenient than having

(quoting Gulf Oil Corp. v Gilbert, 330 U.S. 501, 508 (1947)) (emphasis supplied). Here, ICI has failed to tip the scales heavily in favor of transfer.

2. Since Significantly More Witnesses and a Greater Number of Documents Are Located in New Jersey, New Jersey is the More Convenient Forum.

The convenience of the witnesses is one of the most important factors in the venue determination. Hernandez v. Graebel Van Lines, 761 F. Supp. 983, 990 (E.D.N.Y. 1991) (convenience of the witness is "probably the single-most important factor in the analysis"); Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co., 844 F. Supp. 1163, 1166 (S.D. Tex. 1994) (relative convenience of witness is "the most important factor"). It is unlikely that any of the relevant witnesses in this matter are located in the Northern District of California (certainly, ICI has not made any showing in that regard). That fact alone starkly demonstrates the impropriety of ICI's effort to have California host this dispute.

In a recent case, United States Fire Ins. Co. v. Aldworth Co., No. 04-4963 (JBS), 2005 U.S. Dist. LEXIS 12613 (D.N.J. June 28, 2005), the New Jersey District Court rejected a motion to transfer because the transferee forum was not significantly more convenient than the District of New Jersey. The Plaintiff was a New Jersey resident corporation that brought this action for a breach of insurance contract against Aldworth, a Massachusetts corporate defendant. Aldworth, like ICI, moved to transfer venue to a district with no connection to the dispute or the parties, the Northern District of Georgia, stating that its witnesses and documents were located there. Also like ICI, Aldworth alternatively requested transfer to its home state. The Court reasoned that since the defendant was a Massachusetts corporation, it was not likely (contrary to its assertions) that the bulk of the witnesses and records would be located in Georgia and therefore it would not

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the action remain in New Jersey near the majority of witnesses and the bulk of the documents.

be convenient for the parties or the witnesses to transfer to Georgia. Id. at *14-15. Finally, although finding that Massachusetts was the site of the insurance contract and Massachusetts law would apply to the dispute, the Court nevertheless refused to transfer the matter to Massachusetts because transfer is only permitted to "a more convenient forum, not a forum likely to prove equally convenient or inconvenient." Id. at *14.

Based on ICI's recent due diligence, no representative of ICI or MH who had anything to do with the matters in dispute in this action appears to be located in California. [Little Decl., ¶ 21.] ICI has no corporate office or any physical presence anywhere other than Portland, Oregon. [Little Decl.; ¶ 25.] ICI appears to have no operations in California, no employees in California, nor any real property in California. [Little Decl., ¶ 15.] Although ICI's counsel is located in San Francisco, the convenience of ICI's counsel who is located in California is not considered in a Section 1404(a) motion. Solomon v. Cont'l Am. Life Ins. Co., 472 F.2d 1043, 1047 (3d Cir. 1973) ("convenience of counsel is not a factor to be considered"); In re Horseshoe Entm't, 337 F.3d 429, 434 (5th Cir.), cert. denied, 540 U.S. 1049 (2003) ("The factor of 'location of counsel' is irrelevant and improper for consideration in determining the question of transfer of venue."). None of MH's witnesses are located in California either.

ICI argues that transferring the case would be more convenient for the parties and the witnesses, as "all of the documents, digital information, equipment, and witnesses relevant to this case are located in the Northern District of California as ICI's principal place of business is San Francisco, California." ICI Br. at 9. ICI is again simply ignoring the fact that MH was also involved in the negotiations that led to execution of the Non-Binding Letter by both parties after lengthy negotiations between the parties that included a trip to New Jersey by Ms. Kamys. [Little Decl. ¶¶ 8-9.] ICI's business does not exist in a vacuum. Obviously, MH has relevant documents and witnesses whose testimony will surely be sought by ICI in discovery.

Almost all of MH's likely witnesses in this matter are located in New Jersey. [Little Decl., ¶¶ 19-20.] MH has already identified 14 likely witnesses who were integrally involved in the preliminary discussions between the parties, the due diligence review of ICI's operations from which recommendations were made to MH corporate representatives, or made the ultimate decision whether to enter into a transaction with ICI -- twelve of whom are located in New Jersey. [Little Decl., ¶¶ 19-20.] Additionally, all of MH's files relevant to the possible acquisition deal are located in New Jersey. [Little Decl., ¶¶ 22-24.] MH's emails are also accessible through computer resources in New Jersey. [Little Decl., ¶ 23.] On balance, therefore, it would be far more convenient for the large majority of the witnesses if this litigation remained in the District Court of New Jersey.

If transferred to California, this case would require both parties and all the likely witnesses to travel hundreds if not thousands of miles, from New Jersey, Oregon, or Ohio to California to participate in the case and appear at trial, despite the fact that the case has nothing to do with California. Although some of ICI's witnesses may be located in California or Oregon, the vast majority of the witnesses with knowledge of the facts in this matter are located in New Jersey. [Little Decl., ¶¶ 19-21.] The degree of disruption to the parties and witnesses would be significantly reduced if this case remains in the District of New Jersey because of its proximity to where the majority of witnesses who will likely appear at trial work and reside. See Helfant v. Louisiana & S. Life Ins. Co., 82 F.R.D. 53, 58 (E.D.N.Y. 1979) ("The obvious disruption caused to [the witnesses'] daily work routine and that of the corporations they work for is persuasive evidence that such a transfer would promote the parties convenience."); Pac. Car & Foundary Co. v. Pence, 403 F.2d 949, 953 (9th Cir. 1968) (reversing district court's denial of motion to transfer when, "[m]any witnesses, including several members of the petitioner's corporate staff, would have travel [to plaintiff's original forum] in order to give testimony with consequent disruption of the conduct of petitioner's operation."). Moreover, the majority of the likely witnesses are beyond the subpoena power of the Northern District of California and therefore their presence at trial could not be compelled.

By seeking transfer to California, ICI is attempting to shift the burden of having to litigate in a foreign jurisdiction to MH. Transfers are not granted in such circumstances. NCR Credit Corp. v. Ye Seekers Horizen, Inc., 17 F. Supp. 2d 317, 323 (D.N.J. 1998) (denying motion where "transfer would just add to the convenience of Defendant at the expense of Plaintiff"); Calkins, 117 F. Supp. 2d at 428 ("If the transfer would merely switch the inconvenience from defendant to plaintiff, the transfer should not be allowed"). Furthermore, ICI has already shown its willingness to send its representatives across the county. During the course of the ongoing business relationship between ICI and MH, ICI executives have visited MH's New Jersey office approximately 40 times. [Corcoran Decl. ¶ 11.] In addition to the many trips to New Jersey, ICI representatives have also traveled to several other locations for other client or business related events. [Corcoran Decl. ¶ 12.] Because ICI has established that it is amenable to such travel to expand its business beyond Oregon, it cannot now claim that the prospect of litigating in the forum with which it chose to contract is too inconvenient to proceed.

Since the two parties to this dispute are located on opposite coasts, one will necessarily be required to litigate this matter in a foreign district. As between those districts, each of the public and private interests considered overwhelmingly favors venue in New Jersey.

3. Unlike California, New Jersey Is in Close Proximity to the Operative Events, a Significant Number of Which Occurred at MH's New Jersey Headquarters.

New Jersey is in close proximity to the many events describing the parties' relationship and the operative facts related to the present claims, while California has little or nothing to do with this dispute. Beside the location of MH's office which is in New Providence, New Jersey, and the many witnesses that live in the New Jersey area, ICI had a long-standing relationship with MH's New Jersey employees in connection with both the Marketing Alliance Agreement and the aborted acquisition deal. [Little Decl., ¶¶ 7-9, 19-20; Corcoran Decl., ¶¶ 11-14.] For years, ICI worked closely and regularly with MH's New Jersey office under the Marketing Alliance Agreement to develop websites for MH's own products and services. [Corcoran Decl., ¶¶ 13-14.] Moreover, ICI's first contact about the possibility of an acquisition transaction at issue occurred in New Jersey. [Corcoran Decl., ¶ 15.] ICI personnel, made numerous visits to the MH office in New Jersey over last ten years, including its President, Ms. Kamys, who made key presentations to MH's executives to discuss the potential acquisition. [Corcoran Decl., ¶ 11.] Approximately 100 emails, correspondence and phone calls were sent or made, to MH in New Jersey by ICI to discuss the possible acquisition of ICI. [Little Decl., ¶¶ 7-9.] By contrast, none of the events underlying this dispute occurred in California. [Little Decl., ¶ 27; Corcoran Decl., ¶ 18.]

4. New Jersey Has A Strong Local Interest in the Outcome of this Controversy Involving a Company Based in the State.

California has no interest in adjudicating a business dispute arising from a letter negotiated by MH in New Jersey and ICI in Oregon which has no impact whatsoever on California. Absolutely nothing related to this case took place in California -- not one phone call, not one letter, not one e-mail, not one personal visit. [Little Decl., ¶ 27; Corcoran Decl., ¶ 18.] No representative of ICI or MH who had anything to do with the matters in dispute in this action is located in California. [Little Decl., ¶ 27, Corcoran Decl., ¶ 18.]

This is a dispute between a New Jersey-based company and an Oregon-based company where the substantial weight of the witnesses and proofs are located in New Jersey. [Little Decl., ¶ 28; Corcoran Decl., ¶ 19.] As a company whose principal office is located in New Jersey, MH seeks to resolve this dispute in New Jersey because the facts of this dispute have a close nexus to New Jersey, where many of the events and contacts surrounding this action occurred, and where the disputed non-binding Letter of Interest was made and delivered to ICI, [Little Decl., ¶ 28; Corcoran Decl., ¶ 19.] Moreover, the decision not to pursue the proposed purchase which lies at the heart of this matter was made by MH at its offices in New Jersey. [Little Decl. ¶ 16.] Because many of the activities at issue in this case occurred in New Jersey, the State of New Jersey has an interest in resolving the present dispute.

B. Transfer To California Is Not Proper Because ICI Fails To Prove That The Action Could Have Been Brought There.

ICI's bald assertion that it is currently headquartered in San Francisco cannot transform California into an appropriate venue. Section 1404(a) empowers the Court to transfer an action only to a district "where it might have been brought" as determined by § 1391. The Supreme Court has interpreted § 1404(a) to require that the transferee venue must have been appropriate at the time the case was originally filed. Hoffman v. Blaski, 363 U.S. 335, 343 (1960); see also Shutte v. Armco Steel Corp., 431 F.2d 22, 24 (3d Cir. 1970). Section 1391 limits cases to forums where (1) the defendant resides, (2) a substantial part of the events giving rise to the claim occurred, or (3) any defendant is subject to personal jurisdiction at the time the action was commenced. See 28 U.S.C. § 1391(a). A corporate defendant resides in any district in which it is subject to personal jurisdiction at the time the action commenced.[4] See 28 U.S.C. § 1391(c).

[4] ICI appears to mistake citizenship for diversity jurisdiction purposes with residency for venue purposes.

As the moving party, ICI has the burden of showing that venue in California was appropriate on July 18, 2005, the date the complaint was filed. ICI has failed to make that showing. See Shutte, 431 F.2d at 25. Since ICI concedes in its motion papers that none of the events giving rise to the claim occurred in California, ICI must show that it resided in California when the complaint was filed. See ICI Br. at 3. However, ICI alleges no facts at all to suggest that personal jurisdiction in California on July 18, 2005 would have been proper. ICI does not assert that it was licensed to do business in California, nor does it detail its minimum contacts in California. Instead, ICI bases its entire argument on its supposed "move" from Portland, Oregon to San Francisco, California. However, nowhere does ICI even assert that it resided in California on July 18, 2005. In support of its motion, ICI submitted the Declaration of Debra Kamys, whose only statement regarding the propriety of venue in California is that "[c]urrently, ICI **has moved** its principal place of business to San Francisco, California. All of its information and capital **is to be** located there." [Kamys Decl. ¶ 4.] (emphasis added). This statement is internally inconsistent and of questionable accuracy. Indeed, it is so conclusory that it should be disregarded. See Cohen v. Kurtzman, 45 F. Supp. 2d 423, 432 (D.N.J. 1999) (citing Dell'Aquila v.Riverbank Am., No. 92-3271, 1993 U.S. Dist. LEXIS 21247 (D.N.J. Apr. 16, 1993) (disregarding portions of affidavit that was argumentative or conclusory)).

Significantly, ICI does not give the date of its supposed move to California, if it has occurred at all, or provide any information regarding its "relocation" (or an explanation as to why its website still reflects an Oregon address). Nor does ICI state whether all of the witness/employees of ICI have moved with the company. Some or all of these witness may have declined to follow the company and remain in Oregon. Notably, the ICI's proffered Declaration was actually signed by Ms. Kamys on August 18, 2005 in Portland, Oregon, which -- along with the fact that a search of California's public records did not reveal any presence there by ICI -- strongly suggests that the purported move to California never happened. See [Kamys Decl.] ("Executed on the 18th day of August 2005 at Portland, Oregon."). Transfer to California is not an available option unless ICI can show it was subject to personal jurisdiction in California **before** the complaint was filed on July 18, 2005.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendant's Motion to Dismiss or in the Alternative Change Venue be denied in its entirety.

Dated: September 12, 2005

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